



## On the Bias of Justice and Victors

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When General Pinochet was under arrest in London, and his extradition to Spain seemed to be a possible outcome of his detention, many voices were raised in protest against the selective nature of justice. How can we arrest Pinochet, the cry went, if we do not also judge Cuba's Castro? In an article I wrote at the time I noted that instances of justice are as much characterised by the satisfaction of some to see a tyrant tried, and by the discontent of others with the selective nature of justice in today's world. The same satisfaction and discontent is apparent now, with the trial of Milosevic.

Both the satisfied and the discontented are right of course. They express a paradoxical reality: that in seeking out justice, we violate basic principles of justice. Not to do justice is to abandon a project to promote an «international rule of law». But to do justice is to reveal how far we are from achieving just that.

Victors are always the Judges. The historical winners decide what happens to the losers. The defeated can only judge the victors in the «court of public opinion», but their condition means that their point of view does not get much airplay. What are we to think of this injustice?

I would say that what matters more is not that justice is carried out by victors but the *kind* of justice the victors carry out. Alexander the Great, a man ahead of his time, did justice through summary execution by executive decision, or through the vote by the assembly of male Macedonians-in-arms. For the most part, Alexander's enemies and their kin got off lightly. For his time, he was merciful.



The defeated Emperor Darius and other conquerors and emperors of the time would torture, maim, and kill the populations of whole cities to revenge a wrong.

Today's Alexanders aim to do justice according to due process rules. We aim for a civilised and, if possible, bloodless justice. Today's Dariuses, by contrast, aim to do justice by execution, assassination and genocide. When Pol Pot «won» that is the kind of «justice» he carried out. When the Nazis came to power that was the brand of «justice» they employed. What matters more is that, in doing justice, today's Alexanders remain faithful to the new values of due process, the presumption of innocence, and equality before the law. If trials by victors adhere to these basic principles, we can be *modestly and self critically* satisfied that we are making progress towards the establishment of an «international rule of law».

There is another problem, however. It turns out that victors' justice does not reflect the principle of equality before the law, one of the essential elements of due process rules. It turns out that our justice, although more «civilised» than Darius's is still selective. It is unjust according to our own rules. What are we to think of this injustice?

I would say here that what matters more at this point in time is not so much that it is selective but that we strive to make it universal. Clearly, the majority of war criminals and tyrants are not tried today. State sponsored killers from Argentina to Zimbabwe remain at large. We do not yet have an international court of law, a first essential step towards the universalisation of *the idea* of the «international rule of law». And even after we have one, this will not ensure the *actual* universalisation of justice.

However, there is no way to get from a selective A to a universal B, without being

A-minded. If we do not judge anyone, because we recognise that we violate the principle of equality before the law, we will never establish an international



rule of law; if we judge, we accept that the path towards B is littered with the corpses of selectivity. The position we take in this compromising situation determines whether we even try to reach B, or remain parked *ad infinitum* at point A.

For me the choice is clear. We cannot deny reality. Victors judge and their capacity to try is selective. That is how things are now. No point pretending otherwise. But I think we should make our voices heard in favour of a form of justice that respects due process, and that we try as many people guilty of crimes against humanity as possible, even though it means not being entirely faithful to our own legal rules of conduct. Until we get to a point when 60% or 80% rather than 1% of war criminals and genocidal leaders are tried, we cannot afford the luxury of harking primarily to the notion of equality before the law. Once we reach the 60% mark, I will doubtless start concentrating more on the issue of equality before the law (unfortunately I do not predict such a long life for myself). But I will not do this before we have reached the 60% mark. That would be self-defeating. That would be to throw away the unique opportunity to promote universal lessons that victors have after winning wars against genocide.

There is another kind of selectivity that I do worry about at present, however. Let me start by saying that we need the defeated to «civilise» ourselves. They are sending us an important message. Milosevic is obviously not the voice to represent the defeated. He speaks only for himself and his cronies. But the GALLUP poll carried out last month in the countries of the Middle East is a voice we should listen to. Excluded from the international system, communities of Muslims are voicing discontent with the Emperor. Even the majority of Americans that the US is an arrogant power, if we are to take GALLUP at its word.

In short, it is all very well to be a victor. To win has been glorious since the time of Alexander. But if we are to make a difference between conquering the



Persian Empire and winning wars today, we must begin to cultivate equality before the law for *victor and defeated* alike. The US, today's «imperial power», and its allies, must submit to judgement for their actions as well. They must ratify the Rome Statute and send the message that today's victors are willing to submit themselves to the same rules of judgement as the defeated. This would truly mark a break with our conquering past.

We must, as Alexander the Great did in his time, conquer the whole of the «Known World». Only we must strive to conquer it with the principles of due process and equality before the law. This is a conquest that winners and losers have an equal stake in.